No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMERY KEY, RICHARD MAGNUS, LEON T. McCROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

REPLY TO PETITION FOR REHEARING.

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REPLY TO PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and the Judges Thereof:

By order of this court filed June 1, 1948, the appellees have been directed to limit their answer to appellant's Petition for Rehearing to two questions.

I.

The Decision of This Court Is Not Affected by the April, 1948, Interpretation of the Administrator of the Wage-Hour and Public Contracts Divisions Concerning the Scope of the Motor Carrier Exemption of the Fair Labor Standards Act.

In April, 1948, the Administrator of the Wage-Hour and Public Contracts Divisions, United States Department of Labor, issued a "General Statement as to the Exemption from Maximum Hours Provisions of the Fair Labor Standards Act for Certain Employees of Motor Carriers."[1] The bulletin begins with the following introduction explanatory of its purpose (footnotes omitted):

> "Section 782.0. Introductory Statement.
>
> "(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator as to the scope and applicability of the exemption provided by Section 13(b)(1) of the Act have been expressed in interpretations issued from time to time in various forms. These interpretations were always issued with the understanding that they were only advisory, so far as the rights and liabilities of employers and employees were concerned, because the courts alone had the authority to make legally binding interpretations. However, the Portal-to-Portal Act of 1947 contemplates that interpretations of the Administrator will now, under certain circumstances, be controlling in determining such rights and liabilities in the courts. This, together with recent decisions of the United States Supreme

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[1]Title 29, Chapter V, Code of Federal Regulations, Part 782, published in the Federal Register April 30, 1948.

Court concerning this exemption, has made it necessary, for the protection of employees and employers who may seek to rely on the Administrator's interpretation, that interpretations previously issued concerning the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, be re-examined in order to determine whether they now correctly interpret the law in the light of developments subsequent to their issuance, and that the Administrator's position be clarified for the future. This bulletin, as of the date of its publication in the Federal Register, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretation of the Administrator which will provide 'a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.' The interpretations contained in this bulletin indicate, with respect to the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, the construction of the law which the Administrator believes to be correct in the light of the decisions of the courts and of the Interstate Commerce Commission, and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon re-examination of an interpretation, that it is incorrect."

From this explanatory statement, two things are at once apparent. First, insofar as the interpretations contained in the bulletin may be binding upon the rights and obligations between employers and employees, their effect is prospective in operation. Indeed, no other such

effect is possible under the specific language of Sections 9, 10 and 11 of the Portal Act. At all events we do not understand appellant's contention to be that anything expressed in this bulletin relieves it of liability because of reliance thereon, pursuant to either Sections 9 or 11 of that Act.

Second, and of immediate pertinence to the question under discussion, the bulletin simply expresses the interpretations which *will guide the Administrator in the future* in the performance of his duty to enforce the Fair Labor Standards Act. It does not purport to define the degree of proof which the employer must present in order to bring his employees within the exemption. Nor does it, of course, in any way purport to broaden the scope of such recent court decisions as *Morris v. McComb* (1947), 92 L. Ed. 83, *Levinson v. Spector Motor Service* (1947), 91 L. Ed. 846, or *Pyramid Motor Freight Corp. v. Ispass* (1947), 91 L. Ed. 869, as to the applicability of the exemption.

So, therefore, when the Administrator states that he will for enforcement purposes consider employees in certain categories "who either regularly or from time to time are called upon to perform any operation affecting safety of transportation in interstate commerce" to be within the exemption that language is not intended, nor can it be construed, to disregard the plain statement of the Supreme Court in the *Morris* case that in an action to recover overtime compensation for individual employees, it is necessary to determine the extent to which such employees actually engage in that type of work.

The applicability of the court decisions, including the three Supreme Court decisions above cited, was fully discussed in the briefs of the parties, and was orally argued

in detail before this court. Since the court's decision herein is based upon a full consideration of the principles enunciated in those cases, and the Administrator has simply repeated those principles in indicating how he will be guided in enforcing the Act, nothing contained in the bulletin warrants a rehearing herein.

II.

The Appellant Has Failed to Show That the Appellees Spent Any Substantial Portion of Their Time in Activities Affecting Safety of Operations in Interstate Transportation.

As pointed out above, and in Appellees' Reply Brief, the Supreme Court, in *Morris v. McComb,* has clearly stated that in an action by individual employees to recover unpaid overtime the extent of the activities affecting interstate transportation engaged in by each employee would have to be determined. Not only must the extent of such activities be shown, but it must be further established that each of the appellees devoted a substantial part of his time thereto. *Levinson v. Spector Motor Service* (1947), 91 L. Ed. 846. But that is precisely what the appellant has failed to do.

First, it cannot be determined from the record what portion, if any, of the driving time was driving in interstate transportation. Much of the driving of the appellees was as "packers" in which all that they transported were packing materials. Thus, for example, Vaughn, described by appellant on page 6 of its Petition as a "driver," testified [R. 199] that he had a small packing truck on which he would carry the empty boxes and barrels, and that the larger truck would come around later and pick up the packed goods. This was not trans-

portation in interstate commerce. (In Vaughn's case the eight weeks mentioned by appellant in which he testified he served as a full-time driver was prior to the time for which any recovery was allowed him. [R. 26, 198-199.])

Second, all of the appellees mentioned on pages 6 and 7 of the Petition were packers for the most or some part of their employment. If any inference can be drawn from the record that at some other time they were employees whose activities affected safety of operations in interstate transportation, it is impossible to determine during what periods, if any, they were so engaged.

Third, there is nothing in the record to show what kind of activity any of the appellees was engaged in, so that it may be determined whether or not it affected safety of operations. Let us take the matter of loading, for example. The record does not show what sort of loading activity any of them engaged in. As stated in the bulletin of April, 1948, first quoted from above (quoting portions of Section 782.5, pages 15-17, inclusive, footnotes omitted):

> "(a) A 'loader,' as defined by the Interstate Commerce Commission is an employee of a carrier subject to section 204 of the Motor Carrier Act . . . whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country . . . but he engages as a 'loader' in work directly affecting 'safety of operation' so long as he has responsibility, when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such

a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized."

. . . . . .

"(c) An employee is not exempt as a loader where his activities in connection with the loading of motor vehicles are confined to classes of work other than the kind of loading described above, which the Commission has determined directly affects 'safety of operation.' The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of 'loading' which is described by the Commission and which, in its opinion, directly affects 'safety of operation.' . . ."

The bulletin goes on with a discussion of various types of loading not affecting safety of operation, including the class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect safety of operations, and says (p. 17):

"It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a 'loader' merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure in place, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what

to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done."

In the case at bar, the record discloses no proof as to the nature or extent of appellees' duties which would bring them within the "safety of operation" definition. A mere showing that those who were essentially packers occasionally brought a box or two in to the warehouse, or helped place articles on trucks, does not meet the test in the language quoted.

In this state of the record, has appellant met its burden of proof, merely because an inference can be drawn that *some* of the appellees mentioned in the Petition[2] for *some* portion or period of their employment *may* have been called upon to perform duties affecting safety of operations? Are such employees to be denied their just compensation for the entire remainder of their employment on such an inference, because the state of the record does not enable a finding to be made as to when, if at all, they were in such occupations? Compare the record here with the detailed and elaborate proof before the court in *Morris v. McComb* which conclusively established that each full-time driver either did or might be called upon to perform, during the entire period of his employment, driving in interstate transportation.

Furthermore, we believe it to be abundantly clear that no inference whatsoever of any aid or comfort to the ap-

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[2]Appellant apparently concedes that under no theory could Armstrong, Charette, Fisher, Holder, Kanir, Remus, Wheeler, or Wolf, not mentioned in Section III of its Petition, be deemed within the exemption.

pellant can be drawn from testimony of some of the appellees giving percentage estimates as to their driving time. As pointed out, we do not know during what period of employment such driving was performed, nor have we any way of knowing whether or not it was driving in interstate transportation.

The situation with which we are confronted is well illustrated in the testimony of Richard Magnus [R. 226-236] and the trial court's comment thereon. The trial court had previously indicated that the estimates of percentages had thus far not been too helpful, but in view of the defendant's theory he was permitting it to be thoroughly explored. [R. 208.] Finally, after extensive examination of Mr. Magnus directed to determining when, if ever, he actually hauled the packed materials for interstate transportation, as distinguished from the empty containers, the court stated [R. 236] that the witness "is not telling you he knows what [the percentage] is. He is just guessing. I consider that practically none of the cross-examination has helped the court a bit. The man says, 'I don't know; I am guessing.' The court knows he doesn't know unless he has a record. He is guessing at it for you. If you want him to guess that is all right but it does not mean anything to the court."

Submitting the record to the acid test, the appellees contend that there is nothing therein which would support a specific finding that any of the appellees was within the exemption for the entire or any designated portion of his employment. To the contrary, the evidence is conclusive that all of the appellees are entitled to judgment for all or the most part of their employment. If the appellant was entitled to deny the benefits of the Fair

Labor Standards Act to any of its employees for any portion of their employment, it was its burden to establish by a preponderance of the evidence that the work was "plainly and unmistakably" within the exemption.

A. H. Phillips, Inc., v. Walling, 324 U. S. 490, 493;

Consolidated Timber Co. v. Womack (1942, C. C. A. 9), 132 F. (2d) 101.

Manifestly the appellant has not met this burden by the guesswork and speculation which it must rely upon to establish its defense.

The appellees, therefore, respectfully pray that the Petition for Rehearing be denied.

Respectfully submitted,

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PERRY BERTRAM,
Attorneys for Appellees.